No. ~~744~~ 44

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, *Appellant,*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States District Court be affirmed on the ground that the questions on which the decision of the cause depends do not warrant further argument.

Statement

This is a direct appeal from the order of the United States District Court for the Eastern District of Michigan

dismissing the indictment against appellee on the ground that the indictment failed "to state facts sufficient to constitute an offense against the United States" (Statement as to Jurisdiction, p. 33).

Appellee was indicted on four counts, each alleging a separate violation of Section 610 of Title 18 of the United States Code, which prohibits political "contributions" and "expenditures" by labor unions. Each count alleges that the appellee is a labor organization as defined in Section 610 and that primary (Count I) and general (Counts II, III and IV) elections were held in 1954 in the State of Michigan to select candidates for, and senators and representatives in the Congress of the United States. It was further alleged in each count that appellee expended a specified sum from its general treasury fund to defray the expenses of preparation for and telecasting of political television broadcasts. The indictment set out that those television broadcasts urged and endorsed the selection of certain persons to be candidates for or representatives or senators in the Congress of the United States and that the telecasts included expressions of political advocacy and were intended by appellee to influence the electorate generally and to affect the results of the election.

Each count also alleged that the money for the expenditure came from the general fund of the union, consisting of union dues, and not from voluntary political contributions or subscriptions of members of the union and not from advertising or sales.

Appellee moved to dismiss the indictment upon the following grounds:

1. The provisions of Section 610 do not prohibit the payments set forth in the indictment.

2. The provisions of Section 610 abridge the freedom of speech and of the press, the right peaceably to

assemble and the right of petition of appellee and its members in violation of the First Amendment.

3. The provisions of Section 610 unlawfully abridge the right to choose senators and representatives in the Congress guaranteed by Article I, Section 2 and the Seventeenth Amendment.

4. The provisions of Section 610 create an arbitrary and unlawful classification and discriminate against labor organizations in violation of the Fifth Amendment.

5. The provisions of Section 610 are arbitrary and capricious and deprive appellee and its members of liberty and property without due process of law in violation of the Fifth Amendment.

6. The statute is vague and indefinite and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments.

7. The provisions of Section 610 invade the rights of appellee and its members protected by the Ninth and Tenth Amendments.

On February 3, 1956, United States District Judge Picard dismissed the indictment, holding that "under the authorities the 'expenditures' charged in this indictment are not expenditures prohibited by the Act" (Statement as to Jurisdiction, p. 30). Judge Picard, after a thorough discussion of *United States* v. *CIO*, 335 U.S. 106, concluded (ibid):

> "As is our duty, we try to follow the law as laid down by our Supreme Court and there is no difficulty in doing so here. What the Supreme Court has said is not ambiguous to us."

On February 8, 1956, Judge Picard entered the order dismissing the indictment (Statement as to Jurisdiction, pp. 32-33).

On March 9, 1956, the appellant's Statement as to Jurisdiction was filed in this Court.

Argument

I

UNITED STATES v. CIO GOVERNS THE INSTANT CASE

The decision of the District Court is plainly correct; as Judge Picard held, this case is clearly governed by *United States* v. *CIO, supra.*

That case involved an indictment against the Congress of Industrial Organizations and Philip Murray, its President, arising out of the publication in the CIO News, a weekly published by the CIO from its general funds, of a front-page statement by Mr. Murray urging that a particular candidate be supported in the special Congressional election to be held in Maryland. The district court sustained a motion to dismiss the indictment on the ground that the statute was unconstitutional as an unwarranted abridgment of First Amendment freedoms. In arguing the Government's direct appeal under the Criminal Appeals Act, both the Government and the CIO touched only upon the constitutionality of the statute. No argument was made by either side concerning the propriety of the indictment under the Act. Nevertheless, a majority of this Court, emphasizing the Court's obligation to avoid the necessity of constitutional determinations, considered first whether the indictment stated an offense under the statute, and held that the Act did not cover the publication by a union from its general funds of a regular periodical advocating the election to office of particular candidates. *United States* v. *CIO*, 335 U.S. 106. The Court came to this interpretation

on the basis that any other would involve "the gravest doubt" of the constitutionality of the statute (335 U.S. at p. 121) and would not give due recognition to the fact that "Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment" (335 U.S. at p. 120). Four Justices concurred in the result, holding that the Act clearly violated the rights of freedom of speech, press and assembly secured by the First Amendment.

In the *CIO* case, this Court specifically ruled that expenditures in publishing a union newspaper and distributing copies thereof to those accustomed to received them are not "expenditures" within the meaning of Section 610. The court below could find no distinction in the statute between payments to make possible the expression of the union's views in a union newspaper and payments to make possible the expression of the union's views over a commercial television station. Certainly there is no statutory language on which such a distinction could be predicated. Equally clearly, the legislative history offers no ground for any such distinction; indeed, the discussion on the floor of the Senate evidenced a concern with the expression of union views through a union newspaper at least as great as with the expression of a union's views through commercial channels. 93 Cong. Rec. 6436-6440. Furthermore, the policy of interpreting a statute in such a way as to avoid constitutional questions applies with at least equal force to the indictment now before the Court.

We turn now to the four points suggested by the Government in its Statement as to Jurisdiction as grounds for upholding the indictment in the face of the *CIO* case.

1. The Government suggests that "union broadcasts for the specific purpose of urging the electorate generally to

vote for particular candidates" fall within the literal meaning of the term "expenditure" (Statement as to Jurisdiction, p. 6). Admittedly this is so. But no less did the expenses involved in the *CIO* case for the publication and distribution of the union's views through a union periodical fall within the literal meaning of the term "expenditure". Yet, because of the Court's obligation to avoid grave constitutional issues and because the word "expenditure" had been added to the statute "to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section" (335 U.S. at p. 122), the Court narrowed the literal terms of the word "expenditure" to exclude a union's expression of views in a union periodical. The Government suggests no reason why the literal meaning of the term "expenditure" is any more applicable in the case now before the Court than on the facts presented in the *CIO* case nor why the same considerations which led the Court to narrow the application of the term "expenditure" in the *CIO* case are not equally present in this case.

2. Next, the Government relies upon legislative history and particularly upon a colloquy between Senator Pepper and Senator Taft during the debates on the Taft-Hartley Act (Statement as to Jurisdiction, p. 7), of which the section under consideration was originally a part. The colloquy follows:

> "Mr. Pepper: * * * Suppose that in the 1948 campaign, Mr. William Green, as president of the American Federation of Labor, should believe it to be in the interest of his membership to go on the radio and support one party or the other in the national election, and should use American Federation of Labor funds to pay for the radio time. Would that be an ex-

penditure which is forbidden to a labor organization under the statute?

"Mr. Taft: Yes."

But in this very same debate from which the Government quotes, Senator Taft gave the identical answer with respect to the expression of a union's views in a union periodical.[1] When asked whether a labor house organ would be permitted under the pending bill to carry an endorsement for a candidate considered friendly to labor, Senator Taft replied, "If it were supported by union funds contributed by union members as union dues it would be a violation of the law." 93 Cong. Rec. 6436. The same opinion was expressed by Senator Taft in another part of this same discussion:

> "Mr. Magnuson. . . . They [labor groups] publish so-called labor organs, and a part of a member's dues goes to subscribe for the labor organ. If such an organ were not published the member's dues would be correspondingly less. . . . But now unions collect the subscription along with the dues.
>
> "Mr. Taft. The case is the same as the case of a corporation house organ. A corporation house organ is published and sent out to employees, sometimes many thousands of them. A corporation which used such a house organ to try to elect or defeat a political candidate would certainly be violating the law, in my opinion. Such a law has been in existence for 25 years.

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[1] Both parties in the *CIO* case assumed that the legislative history supported the proposition that the expenses of publishing a union newspaper from union funds constitute "expenditures" within the meaning of the statute. Brief for the United States, *United States* v. *CIO*, No. 695, October Term 1947, p. 44 *et. seq.* and Brief for the Congress of Industrial Organizations, *United States* v. *CIO*, No. 695, October Term, 1947, p. 56.

> What we are now doing is to write into the law the same prohibition with respect to labor organizations as now exists with respect to corporations." 93 Cong. Rec. 6440.

In the *CIO* case, this Court rejected Senator Taft's views as to the meaning of the word "expenditure" in connection with the expression of a union's views in a union periodical, explaining that "it would require explicit words in an act to convince us that Congress intended" such a result.[2] The Government fails to suggest any reason why this Court should give greater significance to Senator Taft's comment on radio stations than it did to his comment on union periodicals and there are no explicit words in the Act to convince the Court that Congress intended the result urged by the Government.

3. The language of the statute and the legislative history applying with equal force to the facts in the *CIO* case as to those in the case at bar, the Government simply announces that the cases are different because, in the case at bar, "the broadcasts were over a commercial television station in which the union had no interest and were addressed to the general public" (Statement as to Jurisdiction, p. 11). But the significance of this factual difference is nowhere stated and no court has ever found this difference of decisional significance.

The United States Court of Appeals for the Second Circuit could find no legal distinction in this factual difference relied upon by the Government. *United States*

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[2] This Court's rejection of Senator Taft's statements may have been facilitated by the circumstance that the Senator had no part in the origination of the "election expenditures" provision of the Act (Section 304, now 18 U.S.C. § 610). The provision was in the House bill, H.R. 3020, § 304, but not included in Senator Taft's bill, S. 1126. It was passed by the House, accepted by the Senate Conferees and subsequently debated by Senator Taft and others on the floor of the Senate.

v. *Painters Local Union #481*, 172 F. 2d 854 (C.A. 2nd, 1949).[3] The indictment in that case alleged that the defendant union (and its President) had placed and paid for a political advertisement in a daily newspaper of general circulation and had paid for and sponsored a political broadcast over a commercial radio station. The funds for these expenses were derived from the general treasury of the union. Both the advertisement and the radio broadcast advocated the defeat of Senator Taft as a candidate for the presidency and the rejection of all incumbent Republican congressmen.

The Court of Appeals for the Second Circuit found no violation of the statute on those facts. Judges A. Hand, Clark and Frank constituted the bench, and, like this Court in the *CIO* case, avoided the constitutional issue by a ruling on the scope of the statute. They held that payments for political advertisements in media of information commercially-owned and of general circulation were not prohibited "expenditures". Judge Hand, writing for the Court, said (page 856) that "It seems impossible, on principle, to differentiate the scope of that decision [*United States* v. *CIO*] from the case we have before us" and he noted that any differentiation between a union-owned newspaper such as was involved in the *CIO* case, and an independent newspaper or radio station "seems without logical justification; nor is such a differentiation suggested by the apparent purposes or by the terms of the statute or by its legislative history."[4]

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[3] See also *United States* v. *Construction and General Laborers Local Union*, 101 F. Supp. 869 (W.D. Mo., 1951).

[4] The Government's distinction of the *Painters Local* case is that the expenditures there were "very small" and were expressly authorized at a special membership meeting of the union (Statement as to Jurisdiction, p. 12). But there is nothing in the word "expenditures", in the legislative history, or in the constitutional principles here at stake which warrants the drawing of a line based on the size of the expeditures; indeed such a line, by its very vagueness, would create more problems than it

4. Finally, the Government, although conceding the importance of construing statutes so as to avoid constitutional issues, nevertheless suggests that the result below "completely redrafts the Act which Congress has passed" (Statement as to Jurisdiction, p. 13). The Government does not suggest, however, why it is more of a redraft to exclude expenditures for a broadcast of the union's views over a commercial station than it is to exclude expenditures for expressing the union's views through a union newspaper. Certainly the constitutional issue of free speech, which the Court sought to avoid in the *CIO* case, is present in both situations. For, as Judge Picard put it, appellee "desired to inform its members and others of the position of the Union on those seeking certain federal offices. It was exercising the right of free speech." (Statement as to Jurisdiction, pp. 28-29). Indeed, since the union was here seeking to communicate with the public at large, rather than simply a segment of the public (its own membership), it was exercising the more traditional right of free speech.[5] It is this very communication with the public

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settled. Judge Picard said he thought it would be "presumptuous" for the courts to write into the statute a distinction based on the amount of the expenditure nowhere suggested by Congress (Statement as to Jurisdiction, p. 28). As to the other alleged distinction—authorization at a special membership meeting—this is a total irrelevancy as far as the statute is concerned; indeed, there is no suggestion in the indictment that appellee did not act with the full authority of the appropriate governing body of the appellee union.

[5] The Government mildly suggests that the expenditure of funds to inform the public of the union's views on a federal election might constitute an "indirect contribution to the campaign of a political candidate" (Statement as to Jurisdiction, p. 13). It is certainly questionable whether the expression of the union's views could ever constitute a contribution, direct or indirect, but however that may be, this point is not in the case. The indictment does not allege a "contribution" and Government counsel in oral argument in the court below expressly waived this point. The following colloquy appears at page 10 of the transcript:

> "The Court: . . . Now, your position is that they just merely wanted to make sure that contributions which you do not question,—

at large that brings about the "free political discussion" (*DeJonge* v. *Oregon*, 299 U.S. 353, 365) and the "informed public opinion" (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 250) which "lies at the foundation of free government by free men." *Schneider* v. *State*, 308 U.S. 147, 161.

One other point, or rather implication, by the Government might be noted. The Government suggests at page 5 that the District Court held in effect "that *no* broadcast by a union, paid for by union funds, can ever be an expenditure" under the statute and again at page 13 that "the court had to conclude that *no* political broadcast by a union can amount to an 'expenditure' under the statute." This is a misreading both of the indictment and of the District Court's holding. The indictment charged appellee with "urging and endorsing" the selection and election of particular candidates. The District Court interpreted the indictment as charging appellee with expenditures "to inform its members and others of the position of the Union on those seeking certain federal offices" (Statement as to Jurisdiction, pp. 28-29). In other words, the indictment on its face and as interpreted by the court below simply charges that appellee sought to inform its members and the public of the position of the union. A holding that such an indictment fails to charge an offense under the statute is a far cry from a holding that "*no* political broadcast by a union can amount to an 'expenditure' under the statute." If in fact there was something specially significant about the particular broadcasts covered by the indictment which went beyond urging and endorsing the selection and election of particular candidates, it was

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and neither side claims that this is a contribution within the meaning of the statute, do you?

"Mr. Woods: No."

Mr. Woods is Chief Assistant United States Attorney and represented the Government before Judge Picard.

up to the indictment to charge these specially significant facts. What the Government is really complaining about now is the terms of its own indictment which alleges facts legally indistinguishable from those in the *CIO* case.

II

THE GOVERNMENT'S POSITION ON THIS STATUTE BEFORE THE INDICTMENT

We have already seen (*supra,* pp. 8-9) that as early as 1949 the Court of Appeals for the Second Circuit held that payments for a commercial broadcast to express a union's political views were not expenditures within the meaning of the statute. From this decision on facts identical with the case at bar no petition for certiorari was filed by the United States. To quote Mr. Justice Frankfurter's concurring opinion in *Andres* v. *United States,* 333 U.S. 740, 756, commenting on a similar failure: "While a failure of the Government to seek a review of that decision by this Court has no legal significance, acquiescence by the Government in an important ruling in the administration of the criminal law . . . carries intrinsic importance where the construction in which the Government acquiesced is not one that obviously is repelled by the policy which presumably Congress commanded."

For six years after the decision in the *Painters Local* case, no prosecutions were brought against unions for the expression of their views via commercial newspapers and radio and television stations and the unions were free to express their election views. The reason for this inaction by the Government was given by the Assistant Attorney General of the United States, in whose jurisdiction prosecution of cases under this statute falls. Assistant Attorney General Warren Olney, III, in charge of the Criminal Division, testified in May, 1955, in hearings on possible

amendments to the Federal Corrupt Practices Act,[6] that because of the shortcomings in this statute, there have been only three prosecutions under this section.[7] He attributed this result to what he described as the "view that the [Supreme] Court takes as to the importance of leaving open all media of public expression for political candidates and for supporters." He went on to say that, although the Supreme Court had not directly ruled on the constitutionality of the statute, "out of the 9 members of the Supreme Court there was not 1 that expressed the view that section 313 [18 U. S. C. § 610] was constitutional. There were 4 of them who were of the view that it was not, and the majority, the other 5, did not pass on the question, but put a caveat in their opinion that they had serious doubt about the constitutionality of it."

Mr. Olney went on to discuss a proposed amendment to the Act which would require consent or authorization by a candidate before a committee could engage in certain types of political activity. Mr. Olney said:

> "The implication of the language of all the judges, both the dissenting and the majority opinions in that case [*United States* v. *CIO, supra*] is that they have serious doubts about a law which says that a group of people interested in a campaign cannot really—and that means without restrictions even as far as finances are concerned—engage in political activity. They indicate a clear reservation that it may be affected by the first amendment that guarantees freedom of the press and of speech.
>
> "In this provision, the way it is worded now, you

[6] Hearings before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration, United States Senate, 84th Cong., 1st Sess., on S. 636, pp. 201, 202-203, 209-210.

[7] The *CIO* case, *supra;* the *Painters Local* case, *supra;* the *Construction and General Laborers* case, *supra.*

see, it is not aimed at requiring the publication of information so that it is fair to the voters, it is a prohibition against the committee collecting money or actively supporting the candidate, if the candidate doesn't want them. . . .

"The thing that it would require is an open public disclosure of the fact as to whether the activity is endorsed by the candidate whom it is supporting, or whether it isn't.

"I do think that the question of the constitutionality of that section is imporant. And I have serious reservations about it."

Mr. Olney was then questioned by the Committee members, and the following colloquy ensued:

"Mr. Duffy. You also referred to the constitutional question which arises as concerns section 304 of this proposed bill which purports to amend section 610 of title 18, which I believe is the same as the Taft-Hartley Act as it stands today.

"Do you believe that it would be better to leave section 610 of title 18 exactly as it is, or do you think that by allowing it to stand unchanged you would still be confronted with the constitutional problem as stated in the CIO case?

"Mr. Olney. Well, if section 304 of 636 is enacted, it still will not affect the dilemma and the difficulty that we are faced with because of the CIO decision.

"Mr. Duffy. It wouldn't help you at all?

"Mr. Olney. No, it wouldn't.

"Mr. Duffy. In fact, it might increase the difficulty; is that true?

"Mr. Olney. Yes; simply because it would be a new expression by Congress reaffirming this same statute

notwithstanding the CIO decision. I am sure you can imagine the consternation of my predecessors when the Supreme Court disposed of that CIO case by ducking the issue. They just didn't pass on the constitutional point. *They expressed so many doubts about it, all of them did, that it made it almost impossible, certainly impractical, to prosecute under it.*" (Emphasis supplied).

Thus, as of May, 1955, this Court's decision in the *CIO* case made it "almost impossible, certainly impractical, to prosecute" under Section 610. One can only speculate on what happened after May, 1955, to cause the Department of Justice to reverse its position and seek to prosecute under the statute.[8] Certainly no judicial decision intervened and indeed the only judicial decision between Mr. Olney's statement before the Senate Committee and the Government's Statement as to Jurisdiction in this Court is Judge Picard's decision following the *CIO* case in line with Mr. Olney's testimony. We do not refer to Mr. Olney's pre-indictment position here to embarrass either him or the Government, but rather to point out how recent is the presently proffered distinction of the *CIO* case and how different is the Government's position here today from its objective judgment prior to this indictment.

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[8] Shortly after Mr. Olney testified, the Chairman of the Republican State Central Committee of Michigan, one John Feikens, testified before the Subcommittee on Privileges and Elections. Mr. Feikens made a number of allegations concerning expenditures by labor unions for political purposes and specifically referred to the series of television broadcasts with which this indictment is concerned (Hearings, *supra*, n. 6, at pages 236, 242).

Conclusion

It is respectfully submitted that the decision below is correct and governed by the *CIO* case. The motion to affirm should be granted.

Respectfully submitted,

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